JUL 28 1993
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NO. 92-1826

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1992

THE STATE OF TEXAS,
Petitioner,
v.
BRENDA FAY PARRISH,
Respondent.

Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW
BY PETITIONER

I.

DOES THE FIFTH AMENDMENT, AS CONSTRUED BY THE HOLDING OF THIS HONORABLE COURT IN *GRADY V. CORBIN*, BAR THE SUCCESSIVE PROSECUTION OF CRIMINAL OFFENSES WHICH SHARE SOME "OVERLAPPING" CONDUCT BY VIRTUE OF THE FACT THAT THEY WERE COMMITTED IN THE SAME CRIMINAL TRANSACTION, NAMELY, MAY A DEFENDANT BE PROSECUTED FOR "DRIVING WHILE INTOXICATED" WHEN SAID DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF "SPEEDING," A CRIME WHICH IS NOT AN ESSENTIAL ELEMENT OF "DRIVING WHILE INTOXICATED".

THE QUESTION PRESENTED BY PETITIONER IS NOT RIPE FOR REVIEW AT THIS TIME

A.) The Texas Court of Criminal Appeals has not had the opportunity to consider the effect of the overruling of *Grady v. Corbin* upon Respondent's claim, that is, that even after *United States v. Dixon*, the offense of "speeding involving a collision" for which Respondent had been tried and convicted, is a species of lesser included offense of driving while intoxicated, in the same single course of conduct, for Fifth Amendment jeopardy purposes, because of the State's announced intent to prove the speeding in the DWI trial, thus rendering the two "the same offence" and barring the DWI trial as a successive prosecution.

B.) The Texas Court of Criminal Appeals may wish to decide the question as matter of state constitutional law after the overruling of

Grady v. Corbin; the matter of state law was raised at each stage of the proceedings below, so that the final decision may well rest upon an adequate and independent state ground obviating any need for this Court's review if the case is remanded.

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No. 92-1826

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THE STATE OF TEXAS,
Petitioner,

v.

BRENDA FAY PARRISH,
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Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari to the Texas Court of Criminal Appeals on the grounds raised by Petitioner, the State of Texas.

Respondent respectfully requests that the Court grant the petition, instead, for the purpose of vacating the judgment below and remanding the case to the Texas Court of Criminal Appeals for further consideration in light of this Court's decision in *United States v. Dixon*, 61 U.S.L.W. 4835 (U.S. June 28, 1993).[1]

1. The State of Texas, as Petitioner, and Ms. Brenda Fay Parrish, as Respondent, are the only parties to this case.

DECISION BELOW

The Texas Court of Criminal Appeals issued its *en banc* opinion on Appellant's (Parrish's) petition for discretionary review from the decision of the Court of Appeals for the Fourteenth District of Texas. The Court of Criminal Appeals denied the State's motion for rehearing as well as the motion for rehearing filed by the State Prosecuting Attorney.

The State requested and was granted a stay of mandate pending its petition to this Honorable Court for a writ of certiorari. After that stay expired the mandate did issue, but upon the State's motion the Texas Court of Criminal Appeals has withdrawn the mandate pending this Court's decision. The following documents reflecting these matters are reproduced in appendices as follows:

Appendix A.	Opinion of Texas Court of Criminal Appeals in *Parrish v. State*, No. 0490-91, issued February 10, 1993 with Order to publish, but not yet published
Appendix B.	Order of Texas Court of Criminal Appeals denying State's motion for rehearing on March 17, 1993
Appendix C.	Order of Texas Court of Criminal Appeals denying the State Prosecuting Attorney's motion for rehearing on March 17, 1993
Appendix D.	Order of Texas Court of Criminal Appeals granting Appellant's petition for discretionary review

Appendix E.	Order of Texas Court of Criminal Appeals refusing State's petition for discretionary review
Appendix F.	Opinion of Court of Appeals for the Fourteenth District of Texas in *Parrish v. State*
Appendix G.	Excerpts from Respondent's Petition for Discretionary Review and Brief on Discretionary Review in Texas Court of Criminal Appeals, raising and arguing state constitutional issue of jeopardy

JURISDICTIONAL STATEMENT

Respondent agrees with Petitioner that under 28 U.S.C. § 1257, this Honorable Court has jurisdiction to review "final judgments or decrees rendered by the highest Court of a State in which a decision could be had...by writ of certiorari...where any title, right, privilege or immunity is specially set up or claimed under the constitution...of... the United States".

The judgment in Respondent's case is a final one because the State's motions for rehearing were denied by the Texas Court of Criminal Appeals, the highest court in Texas in which Respondent could obtain a decision. Respondent did indeed claim a right under the United States Constitution, namely the Fifth Amendment, not to be twice place in jeopardy by successive prosecutions for one offense. This Court, then, has jurisdiction to review the Texas decision construing Respondent's Fifth Amendment claim.

Respondent agrees with Petitioner that on its face the decision of the Texas Court of Criminal Appeals "rested solely upon its interpretation of the Fifth Amendment to the

United States Constitution as guided by its understanding of this Court's decision in *Grady v. Corbin*, *supra*[2], and the Court did not rely upon the statutes or constitution of the State of Texas in reaching its decision". (State's Petition for Writ of Certiorari at 3) However, although the federal question certainly confers jurisdiction, the state constitutional question was raised in the trial court, in the intermediate court of appeals, in the petition for discretionary review and in the brief on discretionary review. It is thus "in the case" to a degree that warrants this Court's remanding the matter to the state court, thereby deferring review of a question that may never return in the form of a federal question at all.

CONSTITUTIONAL PROVISION

As Petitioner correctly stated, the federal constitutional provision which was addressed in this case is part of U.S. CONST., amend. V, which provides that:

> No person....shall....be subject for the same offence to be twice put in jeopardy of life or limb....

STATEMENT OF THE CASE

Respondent was charged with the misdemeanor offense of driving while intoxicated, V.A.C.S. Art. 6701-11(b). She went to trial in the Municipal Court of Houston, Texas on a complaint sworn to on June 14, 1990, charging that on March 31, 1990 she did "then and there unlawfully drive a motor vehicle on a public street at a speed greater than was reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, to-wit: fail to control the speed of his (sic) vehicle and did collide with a motor vehicle being driven by Robert Paul Harwood who operated his vehicle in compliance with legal requirements and with due care." Respondent entered

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2. *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990).

a plea of nolo contendere to this charge on August 13, 1990 and was found guilty and punished by fine.

On April 1, 1990, Respondent was also charged by complaint and information with the misdemeanor offense of driving while intoxicated, the allegation being that on March 31, 1990 she did "then and there unlawfully while intoxicated, namely not having the normal use of his (sic) mental and physical faculties by the reason of the introduction of alcohol into his (sic) body, drive and operate a motor vehicle in a public place."

It is undisputed that the two charges arose from one incident occurring on March 31, 1990.

Respondent filed an Application for Writ of Habeas Corpus and Special Plea in Bar alleging that she had been convicted previously of the same offense. She attached to her application certified copies of the complaint, judgment, and sentence in the prior case: the conviction upon a plea of nolo contendere to the charge of failure to control speed involving a collision.

On August 14, 1990 the trial court conducted an evidentiary hearing upon the special plea of former jeopardy filed by Respondent's former counsel. Undersigned counsel attached a transcription of that hearing to the writ application and special plea filed on October 1, 1990.

The officer at the hearing conceded that his determination that Respondent had lost the normal use of her mental and physical faculties because of intoxication was based not only upon the bloodshot eyes and odor of alcohol but also upon the fact she had been speeding and had had an accident. He testified, "What I'm saying to you is this here: your client was intoxicated, which did not enable her to control the speed to operate a motor vehicle properly."

With the transcription of the hearing, Respondent's written arguments in the application and all the relevant

documents to consider, the trial court denied the application on October 1, 1990.

Respondent filed written notice of appeal, pursuant to the procedure approved in *Ex parte Robinson*, 641 S.W.2d 522 (Tex.Crim.App. 1982) in order to appeal the trial court's denial of her Application for Writ of Habeas Corpus and Special Plea in Bar.

Respondent timely filed her brief in the Fourteenth Court of Appeals, Houston, on December 19, 1990, to which the State replied with a photocopied excerpt from its brief in a different case. Both sides presented oral argument. The opinion affirming the denial of relief was delivered on March 14, 1991 and is published at 807 S.W.2d 41).

Respondent filed her petition for discretionary review in the Court of Criminal Appeals on April 13, 1991, and the Court granted review on June 19, 1991. On February 10, 1993 the Texas Court of Criminal Appeals issued its opinion reversing the lower court's decision and ordering Respondent's misdemeanor information dismissed. The court has stayed its mandate of reversal pending this Court's decision on the State's petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT, VACATING THE JUDGMENT AND REMANDING TO THE STATE COURT FOR FURTHER CONSIDERATION IN LIGHT OF *UNITED STATES v. DIXON*, 61 U.S.L.W. 4835 (U.S. June 28, 1993)

THE DECISION BELOW IS NOT RIPE FOR REVIEW AT THIS TIME

A.) THE TEXAS COURT OF CRIMINAL APPEALS HAS NOT HAD THE OPPORTUNITY TO CONSIDER THE EFFECT OF THE OVERRULING OF *GRADY V. CORBIN* UPON RESPONDENT'S CLAIM, THAT IS,

THAT EVEN AFTER *UNITED STATES V. DIXON*, THE OFFENSE OF "SPEEDING INVOLVING A COLLISION" FOR WHICH RESPONDENT HAD BEEN TRIED AND CONVICTED, IS A SPECIES OF LESSER INCLUDED OFFENSE OF DRIVING WHILE INTOXICATED, IN THE SAME SINGLE COURSE OF CONDUCT, FOR FIFTH AMENDMENT JEOPARDY PURPOSES, BECAUSE OF THE STATE'S ANNOUNCED INTENT TO PROVE THE SPEEDING IN THE DWI TRIAL, THUS RENDERING THE TWO "THE SAME OFFENCE" AND BARRING THE DWI TRIAL AS A SUCCESSIVE PROSECUTION.

B.) THE TEXAS COURT OF CRIMINAL APPEALS MAY WISH TO DECIDE THE QUESTION AS A MATTER OF STATE CONSTITUTIONAL LAW AFTER THE OVERRULING OF *GRADY V. CORBIN*; THE MATTER OF STATE LAW WAS RAISED AT EACH STAGE OF THE PROCEEDINGS BELOW, SO THAT THE FINAL DECISION MAY WELL REST UPON AN ADEQUATE AND INDEPENDENT STATE GROUND OBVIATING ANY NEED FOR THIS COURT'S REVIEW IF THE CASE IS REMANDED.

A.) It would be premature for this Court to exercise its authority now to review the state court decision and decide whether it misconstrued *Grady v. Corbin*, *supra*. When the Court overruled *Grady* only a month ago in *United States v. Dixon*, *supra*, it left as the only standard for evaluating federal jeopardy claims involving successive prosecutions the decision in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed 306 (1932). *Dixon*, *supra*,

opportunity to consider the various positions taken in *Dixon* and to decide whether Respondent's claim might still survive the fall of *Grady*.

Although the writer for this Court in *Dixon*, Justice Scalia, was joined by Justice Kennedy and then by Chief Justice Rehnquist and Justices O'Connor and Thomas in overruling *Grady*, and in holding that the *Blockburger* "same elements" test was the only federal jeopardy standard, the Chief Justice and those who joined him differed with Justices Scalia and Kennedy in how to apply the *Blockburger* test to the cases of Dixon and Foster, the two petitioners.

Justice Scalia looked at the charging instruments. For example, Dixon was found guilty of contempt of court because two elements were proven against him: his knowledge of the CPO (the order that he not commit any further offense, on pain of contempt) and his commission of the offense of possession of cocaine with intent to distribute. The government's later charge for the substantive cocaine offense contained no element not already proven against Dixon in the earlier contempt proceeding and was thus a "species of lesser included offense" under this construction of the *Blockburger* test.

Chief Justice Rehnquist's opinion, on the other hand, in which Justices O'Connor and Thomas joined, maintained that the *Blockburger* test should look only to the statutory elements of the two offenses; he would have found that because the "generic crime" of contempt comprises different elements from the crime of possession of cocaine with intent to distribute, the later prosecution for the cocaine offense should not be barred under *Blockburger*.

It may well be that even under the more expansive construction of *Blockburger* there will be no support for a federal jeopardy bar in the kinds of cases the Texas Court of Criminal Appeals has been reversing based upon *Grady*, because Texas pleading has no bill of particulars requirement and only some of the penal statutes themselves list multiple

manners and means for the commission of offenses. See, for example, the reversals in Respondent's own case and in *State v. Houth*, 845 S.W.2d 853 (Tex.Crim.App. 1992) (DWI statute contains no "element" of speeding or of failure to maintain a single lane, but by an oral "bill of particulars" at a pretrial hearing the prosecution indicated its intent to avoid proof of such conduct to establish DWI, though the conduct was probative of the intoxication element).

However, the Texas courts have shown great interest in the successive prosecution issue as a matter of federal constitutional law, and should be given the chance, Respondent submits, to consider whether any such protections survive in the context of her case. Perhaps the Court of Criminal Appeals will react by turning to Texas' own Constitution.

B.) Respondent raised the Texas constitutional jeopardy issue in her pretrial plea and continued to include that question throughout the state proceedings. While until this time, as Petitioner points out in a footnote in its petition, the Texas courts have on several occasions construed the Texas jeopardy bar in accordance with this Court's application of the Fifth Amendment (State's Petition for Writ of Certiorari at 2, n.2) those cases were decided before *United States v. Dixon*, *supra*. Now that this Court has decided that *Grady* had no constitutional roots, the Texas Court may wish to seek those roots in its home ground.

Reproduced in Appendix G are excerpts from Respondent's petition for discretionary review and brief on discretionary review in the Texas Court of Criminal Appeals, included to demonstrate that if the case is remanded the Texas Court has the means to consider the state constitutional issue immediately.

For the above reasons, this case is not one which requires or merits the exercise of this Court's extraordinary and discretionary jurisdiction at this time.

CONCLUSION

Wherefore, Premises Considered, Respondent respectfully prays that the Court grant certiorari, vacate the judgment below and remand her case to the Texas Court of Criminal Appeals for further consideration in light of this Court's decision in *United States v. Dixon*, 61 U.S.L.W. 4835 (U.S. June 28, 1993.)

Respectfully submitted,

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APPENDIX A

Opinion
In The
Court of Criminal Appeals
of Texas

NO. 0490-91

BRENDA FAY PARRISH, Appellant

V.

THE STATE OF TEXAS, Appellee

Opinion on Appellant's Petition for Discretionary Review from the Fourteenth Court of Appeals

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On March 31, 1990, Appellant was involved in a traffic accident. At the scene, police cited her for failure to control speed and then arrested her for driving while intoxicated. Several months later, appellant entered a plea of nolo contendere to the former charge, was convicted and assessed a fine. Later, formally charged by complaint and information with driving while intoxicated (DWI), appellant initially filed a pretrial motion in conjunction with a writ of habeas corpus, alleging the DWI prosecution was barred because of her earlier conviction for speeding. The trial court denied relief, and the court of appeals affirmed. *Parrish v. State*, 807 S.W.2d 411 (Tex. App. -- Houston [14th Dist.] 1991). We granted Appellant's petition for

discretionary review to consider whether the lower court erred in holding that a successive prosecution for DWI is not jeopardy barred in this case because the State intimated prior to trial that it might not prove, as a part of its DWI prosecution, that Appellant was speeding.

In *Grady v. Corbin*, 495 U.S. 508, 510 (1990), the United States Supreme Court held "that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Whether the government "will prove" conduct is not merely a question of elemental includedness, as in *Blockburger v. United States*, 284 U.S. 299 (1932). We are no longer concerned only with whether the government must necessarily prove the same conduct, but also with whether it will prove such conduct in fact. Thus, it is often impossible to resolve jeopardy problems by an examination of the accusatory pleadings alone.

In *Corbin*, the State of New York was committed to the facts through the filing of a formal bill of particulars to prove conduct for which Corbin had already been prosecuted. But the reach of *Corbin* is not limited to cases in which the State's pleading actually discloses or formally requires that conduct for which the accused was earlier prosecuted will again be in issue. Rather, once the defendant has made a good-faith threshold showing that the accusatory pleading charges him with a crime for which he was formerly placed in jeopardy, it becomes the prosecution's burden to establish that the two offense are not the same in fact. 495 U.S. at 522 n.14. As we understand *Corbin*, the State must demonstrate, in order to meet this burden, that it will not actually prove an offense for which the accused was formerly prosecuted during the prosecution of a different statutory offense arising from the same act or transaction. *See Houth v. State*, No. 0788-91 (Tex.Crim.App. Nov. 25, 1992).

Clearly, in cases where the State regards evidence of conduct for which the defendant was previously prosecuted as helpful but not indispensable to its prosecution of a pending case arising from the same transaction, the existence of a jeopardy bar to the second prosecution is optional. If the State is willing to forego proof of conduct for which the defendant was earlier prosecuted, the second trial may proceed. Otherwise, it is barred.

Because the State's willingness to relinquish a part of its evidence is a mater peculiarly within the discretion and control of prosecuting authorities, it is apparent that a presumptive jeopardy bar can only be overcome if the State's legal representative in court actually makes a firm commitment not to offer at trial evidence of conduct for which the defendant has already been prosecuted. We think a firm commitment in writing is required, because the defendant is entitled to a binding decision on his jeopardy claim prior to trial. *See Ex parte Robinson*, 641 S.W.2d 552, 555 (Tex.Crim.App. 1984). *See also Houth*, No. 0788-91, Slip. Op. at 12 n.6.

In the instant cause, it is apparent from the record, and the parties evidently agree, that both criminal offenses were committed simultaneously. Thus, Appellant has made a sufficient threshold showing that her earlier prosecution for speeding arose from the same act or transaction as her pending prosecution for DWI. We think it clear under such circumstances that the State must commit itself not to prove conduct constituting the offense of speeding in its second prosecution of Appellant.

In this connection, the Court of Appeals concluded that "the State has stipulated that it will not use failure to control speed to prove the DWI." *Parrish*, 807 S.W.2d at 412. From our independent examination of the record, this finding of fact by the court of appeals is supported only by oral statement of an assistant district attorney, made during argument before the trial judge after an evidentiary hearing on Appellant's motion. We think it reasonable to conclude

from these statements that the assistant district attorney believed, at least for purposes of the hearing, that the State was foreclosed by *Corbin* from proving, in its pending DWI prosecution, conduct constituting the offense of speeding. Such a belief is implicit throughout the district attorney's argument, and is expressed more than once by remarks such as "All Corbin says, as it applies to this case, is that we can't talk about the failure to control speed."

Nevertheless we do not believe that the remarks of the assistant district attorney can also reasonably be interpreted as a commitment by the State not to prove certain conduct at trial or even as the expression of a firm intention not to do so. *a fortiori*, they do not establish that the State will not again prove Appellant was speeding. Certainly, the prosecution did not concede on appeal, nor does it now concede, that any stipulation to such effect was ever made. Indeed, it is the State's position on discretionary review that Appellant may be prosecuted for DWI, without offending the Double Jeopardy Clause, whether or not evidence is offered during that prosecution to prove Appellant was also speeding at the time. Accordingly, we hold the evidence insufficient for a finding that the State will not prove Appellant's failure to control speed at her DWI trial.

The judgment of the Court of Appeals is, therefore, reversed and the cause is remanded to the trial court with instructions that the complaint and information charging Appellant with DWI in cause number 9038525 before County Criminal Court at Law No. 4 of Harris County be dismissed.

MEYERS, Judge
EN BANC
DELIVERED: February 10, 1993
PUBLISH
Overstreet, J., dissents

BRENDA FAY PARRISH, Appellant

No. 490-91, v.

THE STATE OF TEXAS, Appellee

Petition For Discretionary Review from the Fourteenth Court of Appeals

(Harris County)

DISSENTING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

By its pleading through a specialized bill of particulars practice, the prosecution in *Grady v. Corbin*, 495 U.S. 508, 510 (1990), locked itself into a double jeopardy holding. Such is not the case presented here. The majority speculates as to what might happen in a trial for diving while intoxicated and, based upon their sighting of gremlins, bars the State through double jeopardy.

There cannot be double jeopardy until there has been jeopardy. The reasoning of the majority escapes me. I dissent.

McCormick, Presiding Judge

(Delivered February 10, 1993)

En Banc

Publish

White, J., joins this dissent

APPENDIX B

(SEAL) OFFICIAL NOTICE March 17, 1993
COURT OF CRIMINAL
APPEALS COA#: 14-90-00989-CR

RE: Case No. 0490-91
STYLE: PARRISH, BRENDA FAY

On this day the State's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

APPENDIX C

(Seal) OFFICIAL NOTICE
COURT OF CRIMINAL
APPEALS

March 17, 1993

COA# 14-90-00989-CR

RE: Case No. 0490-91
STYLE: PARRISH, BRENDA FAY

On this day the State's Motion for Rehearing filed by the State Prosecuting Attorney was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

APPENDIX D

(Seal) OFFICIAL NOTICE June 19, 1991
COURT OF CRIMINAL
APPEALS COA#: 14-90-00989-CR

RE: Case No. 0490-91
STYLE: PARRISH, BRENDA FAY

On this day, the Appellant's Petition for Discretionary Review has been GRANTED. Oral argument, if desired, must be requested ^BY LETTER WITHIN 30 DAYS.^ An original and ten copies of Appellant's brief must be filed with this Court within 30 days. The State's brief is then due 30 days after the timely filing of the Appellant's brief.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

APPENDIX E

(Seal) OFFICIAL NOTICE
COURT OF CRIMINAL
APPEALS

June 19, 1991

COA#: 14-90-00989-CR

RE: Case No. 0490-91
STYLE: PARRISH, BRENDA FAY

On this day, the State's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

APPENDIX F

Opinion
In The
Court of Appeals
For The
Fourteenth District of Texas

NO. B14-90-00989-CR

BRENDA FAY PARRISH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the
County Criminal Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 9038525

This is an appeal from the trial court's denial of a writ of habeas corpus. Appellant brings one point of error alleging that her prosecution for driving while intoxicated (DWI) is barred by double jeopardy under U.S. CONST. Amendments 5 and 14 and TEX. CONST., Article I, Section 14. We affirm.

On March 31, 1990, appellant was involved in an accident. As a result of the accident, appellant was charged with failure to control speed involving a collision. Appellant entered a plea of nolo contendere to the charge on August 13,

1990, and was found guilty and punished by fine. Based on the same accident, appellant was also charged with the misdemeanor offense of driving while intoxicated. Prior to trial on the DWI charge, appellant filed an application for writ of habeas corpus and special plea in bar on the theory that the DWI prosecution was barred by double jeopardy based on the prior speeding conviction. An evidentiary hearing was held before the trial court. The trial court denied the application for writ. The trial court's denial is the basis of this appeal.

In her sole point of error appellant contends that the prosecution for DWI is barred by double jeopardy principles because of her prior conviction on the speeding offense. Appellant bases her argument on the recent Supreme Court case of *Grady v. Corbin*, ___U.S.___, 110 S.Ct. 2084, 47 Cr. L. Rep. 2091 (No. 89-474 opinion delivered May 29, 1990). We agree that *Corbin* controls the disposition of this case, however, it does not provide appellant with the relief she requests.

To determine whether a claim is barred by double jeopardy, the first step requires the application of the *Blockburger* test. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). Where the act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, i.e., whether one is a lesser included offense of the other, is whether each provision requires proof of an additional fact which the other does not. *Blockburger*, 284 U.S. at 304. Under this test, speeding and DWI do not constitute one offense because each offense requires proof which the other does not. In other words, it is possible for an individual to speed without being intoxicated, and it is possible to drive while intoxicated without speeding. Thus, the prosecution in this case survives the initial test for double jeopardy. But, because of *Corbin*, the inquiry does not end here.

When the case at hand involves a second prosecution after a person has previously been in jeopardy, it is necessary to apply the *Corbin* rule if the second prosecution first survives the *Blockburger* test.

As the Supreme Court suggested in *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980), and held in *Corbin*, the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of any offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. *Corbin*, 110 S.Ct. at 2093. This is not an "actual evidence" or "same evidence" test. *Id.* The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. *Id.* Thus, if the State admits it will or does prove conduct for which the defendant has already been in jeopardy, the subsequent prosecution is barred. That is not the case regarding appellant.

Here the State has stipulated that it will not use failure to control speed to prove the DWI. The Supreme Court, in *Corbin*, specifically stated that if the State could prove the second offense without reliance on the offense for which the defendant has already been in jeopardy, the prosecution would not be barred by double jeopardy principles. That exact situation presents itself here. Since the State of Texas has stated that it will not use the failure to control speed to prove DWI, the "essential element" problem of *Corbin* has been circumvented. Appellant's sole point of error is overruled.

The judgment of the trial court is affirmed.

/s/ William E. Junell
Justice

Judgment rendered and Opinion filed March 14, 1991.
Panel consists of Justices Pressler, Junell and Ellis.
Publish - TEX R. APP. P. 90.

APPENDIX G

EXCERPTS FROM RESPONDENT'S PETITION FOR DISCRETIONARY REVIEW IN STATE COURT RAISING STATE CONSTITUTIONAL QUESTION

QUESTION PRESENTED AND REASON FOR REVIEW

QUESTION PRESENTED

WHETHER THE OPINION BELOW CORRECTLY HELD THAT AS LONG AS THE STATE KEEPS ITS PROMISE NOT TO "USE" OR "RELY UPON" APPELLANT'S CONDUCT OF FAILURE TO CONTROL SPEED, INVOLVING A COLLISION, FOR WHICH SHE HAS ALREADY BEEN CONVICTED, TO PROVE THE PENDING DWI CHARGE, THERE IS NO VIOLATION OF DOUBLE JEOPARDY. U.S. CONSTITUTION AMENDMENTS 5 AND 14; TEXAS CONSTITUTION, ARTICLE I SECTION 14

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CASELAW PAGE

Ex parte Peterson, 738 SW2d 688 (Tex.Crim.App. 1987) 5

Ex parte Robinson, 641 SW2d 522 (Tex.Crim.App. 1982) 2

Grady v. Corbin, ___U.S.___, 110 S.Ct. 2084 (1990) 5

Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980) 5

CONSTITUTIONAL

UNITED STATES CONSTITUTION

Fifth Amendment 4

Fourteenth Amendment 4

TEXAS CONSTITUTION

Article I, Section 14 5

C. Review is proper to determine the scope of Article I, Section 14 of the Texas Constitution, the prohibition against double jeopardy. After the supposed demise of the Texas "carving doctrine", it is time for the Court to take note of the Supreme Court opinions cited above, as well as its own long line of decisions, and decide what, if any parts of that doctrine should be born again from the Texas Constitution. The Court may allow the "same evidence" and "same transaction" tests to remain interred, but resurrect other principles that deserve constitutional protection. Cases like Appellant's have accumulated to an extent that merits this Court's attention.

EXCERPT FROM RESPONDENT'S BRIEF ON DISCRETIONARY REVIEW FOLLOWING THE GRANTING OF HER PETITION, ADDRESSING STATE CONSTITUTIONAL QUESTION

C. Finally, review was granted upon Appellant's request that the Court determine the scope of Article I, Section 14 of the Texas Constitution, the prohibition against double jeopardy. After the supposed demise of the Texas "carving doctrine," it is time, Appellant suggests, for the Court to take note of the Supreme Court opinions cited above, as well as its long line of decisions, and decide what, if any, parts of that doctrine should be born again from the

Texas Constitution. The Court may allow the "same evidence" and "same transaction" tests to remain interred, but resurrect other principles that deserve constitutional protection.

Appellant addresses all these concerns in the following argument, and asks the Court to find that in these particular circumstances the State must assess its cases in advance and either try the accused for various offenses in one trial or accept the jeopardy bar that arises from its inattention or from an ill-considered choice.

* * * *

Additional State Constitutional Concerns

This Court in a close decision only recently retreated from its longstanding "carving doctrine" that was premised upon much the same concerns as those found in the Double Jeopardy Clauses of the Federal and State Constitutions. *Ex parte McWilliams*, 634 S.W.2d 815 (Tex.Crim.App. 1982) (opinion on rehearing) The Court decided that in the future it would rely solely upon the constitutional provisions, the Fifth Amendment Jeopardy Clause of the United States Constitution and Article I., Section 14 of the Texas Constitution, instead, to resolve questions of multiple punishments and successive prosecutions. It was suggested in a footnote only last year that the carving doctrine, in principle, is still alive in those cases holding that the State may not use facts litigated in one trial to prove guilt in a second prosecution, as a matter of double jeopardy. *Rubins v. Lynaugh*, 770 S.W.2d 802, 809 n.4 (Tex.Crim.App. 1989) (Judge Teague, dissenting and concurring) Appellant submits that the courts are responding in a logical manner to the demise of "carving" by assessing the problem of multiple punishments and successive prosecutions under traditional jeopardy principles. Some principles formerly analyzed only under the carving doctrine need to take their rightful place in Texas jeopardy law.

The majority opinion in *McWilliams* suggest that the federal and state double jeopardy provisions are substantially the same. 634 S.W.2d at 823-824, but the dissenters thought otherwise, citing, for example, the case of *Hirshfield v. State*, 11 Tex.App. 207, 214 (1881) in which the Court had stated that the carving doctrine was part of the Texas constitutional protection against double jeopardy, in addition to the doctrines of former acquittal and former conviction. *Id.* at 826 (Roberts J., dissenting)

Judge Roberts also cited the rule that the states are free to enlarge upon any constitutional minimum protection the federal courts might recognize, *Id.* citing *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967) and opining that *Hirshfield* and other cases held that the Texas Bill of Rights does just that.

Appellant's point of error is not multifarious in asking this Court to recognize that it has the authority of the Texas Constitution, as well as the United States Constitution to formulate a "same offense" rule along the lines Appellant suggests; she only points out that the Texas Constitution provides an independent, and potentially broader basis for double jeopardy protection.